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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

THE QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Progress report on the question of the impunity of perpetrators of human rights violations, prepared by Mr. Guissé and Mr. Joinet, pursuant to Sub-Commission resolution 1992/23

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PROMOTION AND PROTECTION OF HUMAN RIGHTS: STUDY ON THE ADVERSE EFFECTS OF IMPUNITY AND THE MEANS OF COMBATING IT

INTRODUCTION

A. Origins and purpose of the study

1. From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in their turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity.

2. Conscious of the complexity and seriousness of the problems posed, the United Nations Organization has steadily strengthened its role in action to combat impunity - first, through the formulation of international standards for the promotion and protection of human rights, which all comprise provisions to this end and will be analysed below, and through the establishment of not only treaty-monitoring or supervisory bodies such as the Human Rights Committee, but also special procedures, in the context of the Commission on Human Rights, in the form of country and thematic reports submitted by working groups or special rapporteurs, the first of which were the Working Group on Enforced or Involuntary Disappearances, and then the Special Rapporteurs on summary executions and torture. The question of impunity has also been the subject of several studies submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in the context of the agenda item on the administration of justice and human rights, in particular Mr. Joinet's report on the role of amnesty laws in the safeguarding and promotion of human rights (E/CN.4/Sub.2/1985/16/Rev.1), the reports by Mr. Chernichenko and Mr. Treat on habeas corpus and the right to a fair trial (E/CN.4/Sub.2/1992/24 and Add.1-3), and the report by Mr. van Boven on the right to compensation for victims of gross violations of human rights (E/CN.4/Sub.2/1992/8).

3. Accordingly, the Sub-Commission, by decision 1991/110 at its forty-second session, requested two of its members, Mr. El Hadji Guissé and Mr. Louis Joinet, to draft a working paper elaborating on the question of anti-impunity measures. This paper (E/CN.4/Sub.2/1992/18) was submitted to the Sub-Commission at its forty-third session on 12 August 1992. It contains, inter alia, a preliminary analysis of the legal mechanisms and practices that facilitate impunity and proposes guidelines for the bases of a study on action to combat this scourge. By its resolution 1992/23 of 27 August 1992, the Sub-Commission took note with satisfaction of the working paper prepared by Mr. Guissé and Mr. Joinet and decided to request them "to draft a study on the impunity of perpetrators of violations of human rights" and "to propose measures to combat that practice".

4. In paragraph 4 of this resolution, the Sub-Commission invited Governments, competent bodies of the United Nations, the specialized agencies, regional intergovernmental organizations and non-governmental organizations to provide information on the question. In a note verbale

from the Secretary-General dated 10 December 1992, replies were requested by 15 March 1993 at the latest. Lastly, in paragraph 5 of the resolution, the Sub-Commission decided to consider the preliminary report at its forty-fifth session.

5. At its forty-ninth session, the Commission on Human Rights, in resolution 1993/43, endorsed the decision of the Sub-Commission in its above-mentioned resolution 1992/23; the Economic and Social Council subsequently endorsed the Commission's request.

6. In accordance with the Sub-Commission's new methods of work, the present progress report constitutes a sequel to the working paper submitted last year (E/CN.4/Sub.2/1992/18); its purpose, with a view to the drafting of the final report, is to analyse the mechanisms of impunity in order to understand them more closely and to reflect on the means which might be used to reduce the adverse effects of impunity.

B. Sources

7. The rapporteurs have used the information received in response to the note verbale of 10 December 1992, the reports of the country or thematic special rapporteurs and the copious documentation compiled on the occasion of the International Meeting Concerning Impunity. 1/

C. Scope of the study

8. In order to define the scope of the study, the authors have adopted the three criteria described below.

First criterion

9. The study covers only violations committed by the State or its agents, either directly or indirectly (mercenaries, paramilitary groups, death squads, private militias, etc.). If the Sub-Commission so desires, the study could be extended, in the final text, to cover non-State categories of violations - and this for two reasons:

(a) First, the absence of a State (Somalia) or the weakening of the State (Bosnia and Herzegovina) may facilitate the perpetration of atrocities and acts of barbarism;

(b) Secondly, in certain armed struggles, notably non-international conflicts, serious violations may be committed by private individuals or specific groups, such as guerrilla movements or national liberation movements. 2/ Nevertheless, in the great majority of cases, it is the State which is responsible for serious and massive violations. 3/

Second criterion

10. Sub-Commission resolution 1993/23 and Commission resolution 1993/43, which refer to "perpetrators of violations of human rights", do not expressly refer to action to combat the impunity of perpetrators of serious violations of economic and social rights. Since this is a progress report, this study is

therefore devoted - subject to the deliberations of the Sub-Commission at its forty-fifth session - to infringements of human rights within the meaning of the International Covenant on Civil and Political Rights.

11. Consequently, in the final text of the report, it will be necessary:

(a) Either to deal with the question directly, in which case the title of the study would become: "Promotion and protection of civil and political rights and of economic and social rights: study on the adverse effects of impunity";

(b) Or to opt for a two-stage study, of which the present report would be the first part, to be followed, after the final report, by a second part on perpetrators of violations of economic and social rights.

12. The co-rapporteurs tend to favour the second solution in view of the fact that even though this question has been widely studied from the standpoint of the right to development, it has rarely been approached from the standpoint of action to combat impunity. The only precedent concerns a particular aspect, broached at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which was held in Havana from 27 August to 7 September 1990 (see A/CONF.144/28/Rev.1, chap. I, sect. C) and taken up again by the Commission on Human Rights in its resolution 1992/50 entitled: "Fraudulent enrichment of top State officials prejudicial to the public interest, the factors responsible for it, and the agents involved in all countries in such fraudulent enrichment". If it was extended to cover economic and social rights, the study should take account of this approach as there is an obvious link between tyranny and corruption, violation of human rights, and economic and financial embezzlement for personal ends (Duvalier, Marcos, Noriega are cases in point). Lastly, it will be necessary to study the extent to which action to combat impunity in the area of economic and social rights, rights which are relative and evolutive, may be based on a penal approach, which involves strict interpretation, and whether consideration should be given to other types of sanction.

Third criterion

13. The study deals only with situations concerning serious and massive violations having a systematic character. Cases of impunity following isolated or non-premeditated ill-treatment or other reprehensible conduct therefore lie outside the scope of the study, even though they constitute violations of human rights.

D. Plan of the study

14 Following the guidelines given in the previous papers submitted to the Sub-Commission, and in particular working paper E/CN.4/Sub.2/1992/18 submitted at the Sub-Commission's forty-fourth session, the plan adopted comprises, in addition to the present introduction, two chapters analysing the problems associated with action to combat impunity, as regards first the victims and more generally civil society, and secondly the State, and a conclusion containing recommendations.

I. CIVIL SOCIETY AND THE PROBLEMS ASSOCIATED WITH ACTION TO COMBAT IMPUNITY

A. The victims as a source of law

15. Although, in the present circumstances, one cannot strictly speaking take the view that the victims considered as a juridical category constitute a source of law, they have played and continue to play, through their non-governmental organizations (NGOs), a decisive role in the formulation and development of legal means in action to combat impunity as regards both standards (Declaration on the Protection of All Persons from Enforced Disappearance, for example) and mechanisms (Special Rapporteur on torture or Convention on the Rights of the Child). In both these cases, the activity of the NGOs has been decisive.

16. Their role is equally decisive as regards consideration of the rights of victims. Although action to combat impunity has its roots in the need for justice, it cannot be reduced to the sole objective of punishing the guilty. It must conform to three requirements: the punishment of those responsible, satisfying the victim's right to know and to obtain redress, and enabling the authorities to fulfil their mandate as the public agency which guarantees law and order. Even though their political will is sometimes in no doubt, the authorities' inability to bring absconding guilty parties to trial must not prevent or unreasonably delay the possibility for the victims to obtain redress through appropriate legal remedies.

17. This contribution of "organized victims" to the development of law has been characterized by three important stages: the first was the courts of opinion, the second the international bodies, and the third has been the improvement in the capacity of victims to organize themselves.

1. The courts of opinion

18. The first stage was the so-called "courts of opinion" seized by representatives of the victims which, in the absence of an international tribunal - under study in the United Nations since 1946, filled an institutional lacuna. 4/ In 1967, the French Head of State opposed the holding, in France, of a session of the Russell Tribunal on the grounds that its initiators were "vested with no power and charged with no international mandate and could not therefore perform any act of justice". In order to legitimize their initiatives, the organizers simply responded with the observation that the Tribunal was not a substitute for an existing tribunal since, although an international law certainly existed, there was no tribunal to ensure its enforcement. 5/

19. This shortcoming on the part of the international community lay at the origin of many other initiatives of the same nature. The first dates back to 1959 with the establishment in Athens, by E. Aroneanu, of a court of opinion on the occasion of the trial of Manolis Glezos, a heroic Greek resistance fighter who, in 1944, in the presence of the occupying power had torn down the Nazi flag flying over the Acropolis.

20. The Russell Tribunal on Viet Nam later held sessions in other countries. It became known as the "Permanent Peoples' Tribunal" and sat to rule on the enforcement of international law in some 15 countries, in particular on the question of impunity in Latin America. 6/ Also noteworthy was the meeting in Lisbon, in 1978, of the Humberto Delgado Civic Tribunal on the crimes of the PIDE, the political police under the Salazar regime.

21. The purpose of these tribunals was not to ensure that the guilty were sentenced to effective punishment; indeed, they did not have the institutional or even material means for this purpose. Their raison d'être was simply to rule on respect for international law. Freed of the constraints of criminal sanction, the tribunals were able to display creativity and contribute in an interesting manner to the advancement of international law, in particular with regard to recognition of the universal scope of the fundamental instruments (such as the Universal Declaration of Human Rights) and hence of their applicability to the Governments with which the tribunal was called upon to deal. They were able to do so by developing two premises.

First premise

22. The premise of the declaratory effect of "simply negotiated" instruments (as opposed to the normative effective of conventional instruments). This is the case with the resolutions of the General Assembly of the United Nations, the various declarations and other bodies of principles to which the texts of the Conventions may be assimilated with respect to States which have not yet ratified them. This premise consists in distinguishing, among the instruments negotiated, between those which declare pre-existing rights and are as such applicable to States by the victims or their representatives (e.g. the declarations on territorial asylum or against torture) and those which, being simply declaratory, do not cover pre-existing rights or concern only procedure (e.g. a General Assembly resolution proclaiming a thematic decade). 7/

Second premise

23. When a State is accused of tolerating torture, holding mock trials or making arbitrary arrests, it generally responds by denying any case of torture, by stating that the trials are completely lawful and by maintaining that there are only legal arrests, in short, by explicitly, or in any event implicitly, maintaining that the Universal Declaration of Human Rights, for example, is not being violated. In doing so, the State recognizes conversely - as it were, by confession - the binding force of the principles contained in the Declaration since it denies having violated them. Consequently, whether it manifests itself through a positive or negative reference, this recognition strengthens the universal character of respect for the principles concerned. 8/

2. The international bodies

24. The second stage has been recourse to international bodies by using innovative solutions, notably through the submission of applications to the

Inter-American Commission on Human Rights (IACHR). 9/ On a first question of principle, IACHR considered that a law which conferred on the State (the Public Prosecutor's Department) a monopoly over proceedings is open to criticism because in the systems which so permit, the victim of the offence has access to the courts by virtue of the fundamental right of the citizen, which is of particular importance as a driving-force in criminal action. IACHR does not, however, seem to reach an explicit decision on whether this right, recognized as fundamental, is protected by international human-rights law or in any event by the American Convention on Human Rights, of which no provision to this effect is referred to.

25. But above all, in the case cited above, and in a similar case involving Argentina, 10/ IACHR took the view that any law that put an end to the possibility of prosecuting the perpetrators of human rights violations, either through an amnesty or by any other means (although it did not clarify the situation regarding prescription), has consequences that jeopardize the right of every person "to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal previously established by law ... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature" (American Convention on Human Rights, art. 8, (1)). IACHR accordingly declares the inalienable right of victims to benefit from this provision, i.e. without restriction, whereas the Government takes the view that its scope extends solely to safeguarding the rights of persons prosecuted as perpetrators and not the rights of victims (see chap. II, para. 109).

3. Increased capacity of victims to organize themselves

26. The third phase has been the steady increase in the capacity of victims to organize themselves. They initially made themselves heard through the principal "general" non-governmental organizations. As from the 1970s and as a reaction to the crisis of the enforced disappearances in Argentina, victims' families organized themselves into specialized NGOs (e.g. the mothers of the Plaza de Mayo). After spreading to many other Latin American countries, this initiative gave birth, at the regional level, to a federative organization in the form of the Latin-American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), which has specialized in combating impunity.

27. In the conclusion we shall return to the desirability of encouraging this trend in view of the decisive role of victims' NGOs in developing policies to combat impunity. With the exception of Greece, following the fall of the dictatorship of the colonels, Governments have seldom taken the initiative in trying the guilty, in the absence of any pressure from society at large.

28. However, the action of NGOs is not limited solely to their traditional role as pressure groups. By taking the stage as a third force in the frequent conflicts between the civil authorities and the former military authorities and the armed forces, they modify the ratio of forces; on the basis of the claims of the victims, the new authorities are better able to withstand the pressure of the military when the latter endeavour to evade their responsibilities. However, they must have the political will to do so.

B. The law versus the victims

29. Through the patient collection of data and analysis of the legal mechanisms employed, the victims first of all, then the NGOs and, within the United Nations, the special rapporteurs on countries, the thematic special rapporteurs and the treaty monitoring bodies have revealed more clearly how impunity policies are developed. These policies have taken two paths which have for the most part been complementary: firstly, de facto impunity resulting from the dysfunction of the institutions concerned, which is either directly or indirectly encouraged, or even organized by the authorities; and secondly, impunity legitimized by provisions borrowed from the rule of law and diverted from their purpose.

1. The mechanisms of de facto impunity

30. After the police, the judicial authorities in turn pretend to be unaware of or conceal violations and the identity of the perpetrators; this can happen when proceedings are initiated at the investigation stage, at the trial or at the time of enforcement of the penalty. The situation worsens when it is no longer the ordinary courts, but the special, and most frequently military, courts that are concerned.

(a) Under the ordinary courts

31. The mechanisms of impunity vary with the different stages in the procedure.

(i) The prosecution stage

32. The State has a specific monopoly over the initiation of prosecutions: the Public Prosecutor's Department alone may initiate prosecutions. Although the victims or their relatives may normally demonstrate a legitimate interest in the case, they are legally barred from bringing criminal indemnification proceedings. As a result, they are unable to combat the collusive inertia of the authorities.

(ii) The investigation stage

33. This stage is jeopardized by a number of factors. The frequently passive attitude of the investigators is compounded by the difficulty in identifying the perpetrators who, frequently enjoy the well-disposed complicity of the authorities (death squads, private militias, paramilitary bodies, mercenaries), act anonymously (unregistered cars, plain clothes, no distinctive insignia, hooded faces, etc.) and keep the victims in a secret place after their arrest. In some cases, if there is any likelihood of the perpetrators being identified, they are transferred to a distant post, preferably abroad. A few skilfully publicized and targeted "measures" against certain witnesses will in future discourage any others from coming forward to help seek the truth in all other cases. 11/ If the victim dies, the investigation frequently draws a blank because of a deliberate failure to carry out an autopsy or because the autopsy is purposely botched. 12/

(iii) The trial stage

34. As a result of the lack of adequate guarantees of independence to enable judges to withstand pressure, justice is diverted through partiality, intimidation and, to a lesser extent, corruption.

(a) Partiality: This involves the use of a procedural subterfuge through which the executive "chooses its judge", i.e. a politically reliable judge or a judge ideologically close to the authorities and who, in some cases, has even pledged his allegiance by oath; reluctant judges are expelled from the judiciary or assigned to litigation with no political implications.

(b) Intimidation: This may involve physical attacks or, more often than not, anonymous threats, including threats against relatives. In most cases, such pressure is exerted more surreptitiously, in the absence of minimal guarantees, by waving the carrot and the stick over the career prospects of judges or investigators.

(c) Corruption: Unless we regard the career benefits granted by the powers that be as corruption, it is uncommon in this sphere; the two other methods mentioned are by far the most common.

It will be noted that one form of manipulation observed during the trial stage is to avoid punishment, despite proof of guilt, by deciding to release or acquit the suspect, frequently on the grounds of doubt, or by handing down an absurdly light sentence or one that is automatically suspended.

(iv) Enforcement of the sentence

35. When it has not been possible to avoid the trial, this device involves giving the impression that "justice has been done", and then taking matters in hand when the sentence is pronounced or due to be enforced, either by failing to enforce it or by ensuring that it is served in premises that are so comfortable or where the regime is so lax that the atmosphere is more like that of a holiday resort than a penitentiary.

(b) Under states of emergency

36. In addition to the annual reports by Mr. Leandro Despouy on states of emergency, 13/ the study by Mrs. Nicole Questiaux on the implications for human rights of recent developments concerning situations known as states of siege or emergency (E/CN.4/Sub.2/1982/15) and, more recently, the report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1991/20) have underscored the pernicious role played by courts of special jurisdiction, in particular military courts, in encouraging impunity. As members of the armed forces, the judges who make up the military courts are responsible to the armed forces ministry and hence to a hierarchical authority that is hardly compatible with the requirement of independence. This engenders, on the one hand, a strong esprit de corps which tends to justify or even legitimize violations in the name of a higher interest or the performance of a mission

(the preservation of social order, combating subversion, etc.) with which the armed forces have supposedly been vested, and, on the other, a tendency to make "national security" the rule rather than the exception, which provides a means of concealing evidence and preserving the anonymity of the perpetrators of violations.

2. The mechanisms of impunity through operation of the law

37. This method involves giving impunity a legal façade either by promulgating - as a rule without a parliamentary vote - ad hoc laws, or by diverting existing laws from their purpose. The most frequent methods employed involve clemency measures, such as amnesty, pardon or pardon with amnesty, or rules of ordinary law such as prescription or mitigating circumstances. What principles are involved and how are they diverted?

(a) The use of clemency measures for purposes of impunity

38. Let us review the principles that normally apply.

Amnesty: This entails decriminalizing the acts in question and the penalty is deemed never to have been enforced, regardless of whether or not the perpetrator has been prosecuted or convicted, and whether or not the penalty has been enforced. The rights of third parties are alone preserved. 14/

Pardon: Its origins lie in customary law; a pardon is granted by virtue of regalian authority, which is a prerogative of the Head of State alone. It applies to an individual and fully or partially exempts the beneficiary from serving the sentence although, unlike an amnesty, it does not expunge the conviction.

Pardon with amnesty: This is a combination of the two measures mentioned above and has the effects of both amnesty (expungement of the conviction) and pardon (personal measure independent of the nature of the criminal acts).

39. This recapitulation will make it clearer how manipulation works: it entails observing the letter but not the spirit of these clemency measures. Where amnesty is concerned, it avoids parliament, enabling the perpetrators of violations to grant themselves amnesty. As to the right of pardon, in this context it is exercised by a self-proclaimed Head of State, a fact which deprives of any legitimacy a power which is already in itself excessive, and confers on it a veritable right of life or death over others when capital punishment is one of the possible sentences, as is alas all too often the case in times of unrest.

40. Under the pretext of achieving equilibrium, another process known as "mutual amnesty" actually promotes impunity. Former opponents who voiced their opinions are amnestied ... the better to amnesty the oppressors, who were not content merely to voice their opinions. The nature of this device becomes apparent when the "pseudo-law", again under the guise of equilibrium, obliges the victim to remain silent, the better to distract attention from the

torturer. It establishes a kind of "conspiracy of silence" which, by means of so-called "implementing measures"; deprives the victims of any possibility of obtaining the financial or simply moral redress to which they are entitled under ordinary law. The aim is not so much to avoid the budgetary cost of compensation as to prevent any form of investigation that could lead, even if only in connection with a hearing for compensation, to any form of publicity.

(b) Diversion of rules of ordinary law for purposes of impunity

41. Just what are these rules under ordinary law?

Prescription: This concerns either the public right of action or enforcement of the sentence. In the first case, beyond a certain time-limit determined by law, the public right of action is extinguished, thereby causing the possibility of initiating proceedings or pursuing proceedings under way, to expire, regardless of the offences committed. Prescription applies in rem; all the perpetrators, co-perpetrators or accessories thus benefit from prescription as from the date of the acts concerned, even if their respective involvement occurred at different periods. In the second case, the sentence may no longer be enforced even if the person who has, by definition, already been tried (escape, trial in absentia) is arrested.

Mitigating circumstances: The most widespread method draws on the principle of so-called "due obedience", under which the sentence handed down is symbolic or even non-existent. As the perpetrator of the violations was merely carrying out orders from a higher authority, it is maintained that he incurs no criminal liability. The question arises in principle only, in strictly graduated State institutions (essentially, the armed forces and the police) based on tight discipline. Refusal to obey a superior thus constitutes a disciplinary or even criminal offence, and as a result the margin of freedom of the person carrying out the order is reduced or even eliminated by the nature of the institution. 15/

42. What forms of diversion are employed? It is precisely to combat manipulation of the rules regarding prescription and mitigating circumstances that victims' associations and non-governmental human rights organizations make the following demands:

(a) First, that the most serious violations be classified as crimes against humanity, in order that they become imprescriptible by nature, or at least that some of these crimes (e.g. enforced disappearances) be classified as continuous crimes, in order that the time from which prescription applies may be deferred until the date on which the case is elucidated, i.e. when the person has reappeared or proof of his death has been furnished. In this regard we shall refer to article 17 of the Declaration on the Protection of All Persons from Enforced Disappearances. 16/

(b) Secondly, that due obedience may not be invoked in the case of such crimes (see art. 6, para. 1, of the above Declaration. See also art. 2, para. 3, of the Convention against Torture, under which "An order from a superior officer or a public authority may not be invoked as a justification of torture". It should be noted that this wording leaves open the question whether such an order may be invoked as an extenuating circumstance).

43. On the other hand, the Charter of the Nürnberg Tribunal explicitly referred to mitigating circumstances: "the fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment ...". In its draft Code of crimes against the peace and security of mankind, the International Law Commission apparently takes the same view, albeit only implicitly:

"Article 11

Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order." 17/

However, if the individual did not have that possibility, should he, conversely, be regarded as not incurring responsibility or merely be granted mitigating circumstances? Here again, the question remains open.

II. THE STATE AND PROBLEMS ASSOCIATED WITH ACTION TO COMBAT IMPUNITY

44. Until recently, action to combat impunity was essentially taken by the non-governmental organizations. On account of national circumstances or in order to avoid drawing attention to "certain traumatic events" in their past, States were somewhat reluctant to see this item on the agenda. Hence the importance of the above-mentioned resolution 1993/43 of the Commission on Human Rights as it encourages the Sub-Commission in its approach, which the World Conference on Human Rights has in turn recently encouraged in the following terms:

"The World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue."

A. States' awareness of their responsibilities

45. States' awareness of their responsibilities may be greatly facilitated by a non-selective approach to the problem, based on the following premises:

(a) No country or continent has a "monopoly" of practices that lead to impunity; they may take root in any culture; any country may, at some point or other in its history, be confronted with this evil.

(b) The argument that impunity is inversely proportional to the level of genuine democracy (that the perpetrators of serious and massive violations are unlikely to go unpunished in a country with a long democratic tradition) needs to be put into perspective; it fails to take account - yet again - of the historical dimension of the phenomenon by disregarding, for example, the

atrocities committed by numerous west European countries during the colonial wars, either in the distant or recent past, and which have gone unpunished in almost all cases. In this connection, the commemoration in 1992 of the so-called "discovery of the Americas" and, in particular, the proclamation by the General Assembly of 1993 as International Year for the World's Indigenous People will have provided an opportunity to develop such an awareness, whether of the genocide of the Indians or of the shipping of slaves to the Americas. 18/

(c) The increasingly detailed knowledge available of the mechanisms of massive violations - particularly as a result of the development of the thematic and country special rapporteur procedure, the treaty-monitoring bodies and peace plans such as that formulated by the United Nations Observer Mission in El Salvador (ONUSAL) - shows that they are neither unavoidable nor attributable to a form of incompetence, but the expression of a deliberately planned and implemented policy and that, as such, they are reversible.

(d) The end of the cold war has given a new - and complementary - dimension to the problems of impunity, with the emergence of novel processes of democratization, restoration of democracy or challenging of certain democratic concepts. Beyond questions of failure or success, these processes have made it possible, with hindsight, to facilitate the development of this awareness within the State; following Latin America, south-east Asia and more recently Africa, the fall of the Berlin Wall launched eastern Europe along this perilous path, accompanied by rising nationalism in the east and racism in the west, but also by hope. In most cases, the massive human rights violations which had been firmly and persistently denied in the forums of the United Nations have turned out to be true, and sometimes even more serious than was believed.

B. The obligations entered into by States, under the provisions of international law, to combat impunity

46. There is an increasing number of international instruments that set forth this binding obligation, but this does not necessarily mean that they are being implemented more effectively. In the following paragraphs we shall mention the principal provisions of international law relevant to efforts to combat impunity.

1. Universal Declaration of Human Rights

47. Articles 7 and 8 of this fundamental instrument stipulate:

"Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law.

...

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Everyone is therefore entitled to enjoy his rights in his daily life and to exercise them without hindrance and under the protection, if necessary, of appropriate judicial and administrative institutions.

2. International Covenant on Civil and Political Rights

48. Article 2 of this Covenant reasserts the following principle:

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind ...".

...

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

49. Article 4 of this Convention stipulates that "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture." Furthermore, article 5 contains a clause of universal jurisdiction which makes it mandatory for every State party to try or extradite the perpetrators of such crimes under their jurisdiction.

4. Convention on the Prevention and Punishment of the Crime of Genocide

50. This instrument was adopted by the General Assembly on 9 December 1948. It classifies genocide as "a crime under international law", thereby assimilating it to a crime against humanity. It should be noted that article VI stipulates that those responsible may be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." This provision has remained a dead letter, as has the provision contained in

article VIII, under which "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

51. It should also be recalled that article II of the Convention contains a limitative enumeration of victim groups: destruction, "in whole or in part, [of] a national, ethnical, racial or religious group, as such". The term "political group", which appeared in the preliminary draft, was finally not adopted. This is all the more regrettable as the second half of the twentieth century has witnessed massacres having all the characteristics of genocide (such as that committed by the Khmer Rouge) but which may not be classified as such because they were directed against a political group. This matter should be re-examined in the final report in the light of the study by Mr. Benjamin Whitaker on the question of the prevention and punishment of the crime of genocide (E/CN.4/Sub.2/1985/6).

5. International Convention on the Suppression and Punishment of the Crime of Apartheid

52. For the record, it will be recalled that article V of this Convention stipulates:

> "Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction."

This international tribunal, too, has never come into being; as for the Convention, although it has served a rhetorical purpose, it has never been effectively implemented and has in most cases been invoked by NGOs and disregarded by the States parties.

6. Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

53. This Convention has been supplemented by resolution 3074 (XXVIII) of the United Nations General Assembly, dated 3 December 1973, concerning the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, paragraph 1 of which stipulates:

> "War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."

To achieve this aim, States undertake to cooperate with each other on a bilateral and multilateral basis.

7. Declaration on the Protection of All Persons from Enforced Disappearance

54. This Declaration was adopted by the General Assembly in resolution 47/133 on 18 December 1992. It contains provisions making it one of the most advanced instruments in the campaign against impunity. The principal provisions to this end include the following:

(a) The fourth preambular paragraph, which states that the systematic practice of enforced disappearance "is of the nature of a crime against humanity";

(b) Articles 3 and 6, which dismiss mitigating circumstances and therefore make it impossible to benefit from the principle of "due obedience", except in the case of a perpetrator who establishes his repentance by providing information enabling cases of enforced disappearance to be elucidated;

(c) Article 14, which establishes the conditions for a clause of universal jurisdiction;

(d) Article 17, which classifies enforced disappearance as a continuing offence, thereby establishing a close link with the category of crimes to which statutory limitation does not apply by postponing the time from which statutory limitation applies to the date on which the disappeared person reappears or on which his death is confirmed.

8. The four Geneva Conventions and Protocols I and II to the Conventions

55. International humanitarian law as codified by these instruments constitutes one of the most binding measures applicable to States. Article 1, common to the four Conventions, stipulates that the "High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Accordingly, each State party makes a commitment concerning not only itself - which is the rule - but also - and this is quite exceptional - other States, regardless of whether they are parties to the conflict in question.

56. This call to universality is encouraged by the existence of a clause of universal jurisdiction similar in nature to that contained in the Convention against Torture (see para. 49). Here again, the final report should examine why so little use has been made of it, despite its being common to the four Conventions (I, art. 49; II, art. 50; III, art. 129; IV, art. 146), as are the clauses concerning machinery to prosecute and punish grave breaches (I, arts. 50 to 52; II, arts. 51 to 53; III, arts. 130 to 132; IV, arts. 147 to 149; Protocol I, arts. 85 and 65).

57. By the end of 1992, 175 of the 178 States Members of the United Nations had ratified the Geneva Conventions. Unprecedentedly, therefore, they have become treaty norms of virtually universal scope, and thus one of the most effective instruments for combating impunity, provided there is a genuine political will to implement them. However, the question is whether such a

will exists. Here again, the final report will need to analyse why so little use is made of the relevant provisions of the four Conventions and of their Protocols to combat impunity.

58. Such are the essential international legal norms relevant to the campaign against impunity. This inventory, which is not exhaustive, demonstrates the importance of a cautious country-by-country examination of the conformity of domestic norms to the international norms and of their interpretation by the institutions responsible for their implementation, failing which impunity is liable to continue to prevail over law.

9. Draft Code of Crimes against the Peace and Security of Mankind

59. To conclude this inventory, mention should be made of the draft Code prepared by the International Law Commission (ILC), the second part of which, relating to crimes against the peace and security of mankind, contains article 21 entitled "Systematic or mass violations of human rights". This article concerns murder, torture, establishing or maintaining over persons a status of slavery, servitude or forced labour, persecution on social, political, racial, religious or cultural grounds, and deportation or forcible transfer of population.

C. Contradictions between the need for justice, the requirements of collective memory and the political constraints of reconciliation

60. These contradictions evolve in the light of the interplay of the social forces which exist at a particular point in time, and these forces themselves evolve over time. The contradictions may be rekindled with hindsight, when the need to know overrides the need for justice. It is in this context that the State has to assume its fundamental share of responsibility in organizing action to combat impunity as a political undertaking inasmuch as it concerns the country's past, but also determines its future.

1. The need for justice

61. Whether the victims are political opponents or dissidents, ideological opponents, members of armed movements or ordinary citizens, by demanding justice they act as the driving-force in the campaign against impunity. It is on their behalf that the international community mobilizes. The need for justice may express itself through different priorities linked to the specific history of each country. In Latin America, for example, victims' organizations are mostly concerned with bringing the oppressors to trial, purging the armed forces and elucidating the fate of the victims of enforced disappearances. In eastern Europe, public opinion - while calling for those primarily responsible to be brought to justice - is more concerned with the rehabilitation of the victims, particularly in moral terms since opponents were often branded as maladjusted, insane or simply common criminals, and with purging the administration, with all the risks of excess which that entails. The national judicial system is primarily responsible for responding to this need for justice; however, should it fail to do so, the question of the competence of an international tribunal arises. 19/

(a) Responses at the national level

62. There is a broad range of choices between what is ideally desirable and what is relatively feasible. We shall consider those which are most commonly encountered: firstly resorting to the national courts, and secondly, the establishment of a national commission to investigate serious violation committed under the previous regime.

(i) The role of the national courts

63. National competence must remain the rule, as punitive measures are the monopoly of States. This is in fact why conventions provide for a commitment by States parties to adapt their legal framework and to incorporate treaty norms into their domestic law (admission procedures). 20/ The jurisdiction of any international tribunal can therefore only be subsidiary. The two categories of measures which may be taken are examined below.

64. The first measure involves abrogating those special laws and courts of special jurisdiction (or at least removing cases from the latter) which have been instrumental in or sanctioned the violations suffered by those expressing their need for justice. The final document of the World Conference on Human Rights (Vienna, June 1993) particularly stresses this point when it declares that States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law (see A/CONF.157/23, second part, sect. B.5, para. 60).

65. Under what is known as the principle of "formal parallelism," the method of abrogation by decree seems feasible, at least in the case of legislation promulgated without any parliamentary supervision or under the supervision of a rubber-stamp parliament whose members are appointed by the executive rather than being elected in accordance with the elementary rules of popular participation.

66. The second measure concerns the judges who make up the competent courts. If we assume that domestic legislation against impunity has been adopted - or is in any event applicable, how is it possible to overcome the reticence of serving judges if they have backed - or even actively cooperated with - the former regime? We are well aware how such connivance verging on complicity - explicit under the former regime, - may subsequently persist implicitly. 21/ The only possible measure in the worst situation is simply to replace the judges; 22/ however, whenever a compromise is possible, efforts should be made to ensure maximum compatibility with the principle of irremovability, which is considered to be one of the essential guarantees of independence. This leaves two possibilities.

67. The first possibility is to distinguish between (a) judges appointed in accordance with the rule of law and (b) those designated by virtue of a statute lacking the essential guarantees established by the Basic Principles on the Independence of the Judiciary, 23/ especially when they have simply been appointed by the executive. In this second situation, it is again possible to draw on the rule of formal parallelism to legitimize the

possibility of transferring these judges (not to say, pseudo-judges) by a simple executive decision or of removing them from office provided that the right of all persons to a hearing, under article 14, paragraph 1, of the International Covenant on Civil and Political Rights, is respected.

68. The second possibility is to set up a court with nationwide jurisdiction whose judges are appointed in accordance with the Basic Principles on the Independence of the Judiciary, taking into account, if possible, all shades of opinion in the composition of the court. To avoid charges that the court is of an ad hoc nature or is a court of special jurisdiction, its rules of procedure and operation should be those of the ordinary criminal courts, or, in any event, should comply with the procedural guarantees contained in article 14, paragraph 3, of the International Covenant on Civil and Political Rights.

69. There may also be other - objective - factors that foster impunity, in particular lack of training and lack of means. The case has been cited of one country where, for lack of funds, fewer than 25 per cent of judges possess legal training.

(ii) The role of national commissions set up for investigations and to establish the truth

70. Argentina was the first country to take such a step when, on 15 December 1983, it set up a National Commission on the Disappearance of Persons (CONADEP), which in 1984 submitted an extremely detailed report entitled Nunca más (Never again). In April 1990, Chile took an initiative which deserves emphasis: it set up the National Truth and Reconciliation Commission, which has not only endeavoured to investigate the facts, but has also analysed, category by category, the behaviour, acts of resistance or collaboration within Chilean society (political parties, trade unions, charitable organizations, the press, churches, etc.) during the dictatorship. Its voluminous report 24/ not only tries to shed light on the most serious violations, but proposes measures in support of the victims and action to prevent further violations. Another initiative also deserves particular emphasis: the establishment, in El Salvador - under the Mexico City Peace Agreements of 27 April 1991, of the Commission on the Truth, which published its report on 15 March 1993 (S/25500, annex). Unlike the two other commissions mentioned in this paragraph, its members include prominent international figures.

71. These commissions have a primary function to which insufficient emphasis is given: they show up the "official version" as a lie by substantiating the facts and abuses that were consistently denied at the time by the highest authorities.

72. Their primary purpose is to establish the facts; but when their purview also extends to establishing responsibility, what is involved in most cases is the responsibility of the State agencies concerned, in particular those that supervised, ordered or carried out the serious violations, but not the individual responsibility of the perpetrators. A fortiori, they have no

judicial authority. The information and testimony they gather are none the less of great value, assuming that the machinery set up to combat impunity combines action by the courts and the commissions to establish the truth; the information gathered by the latter accordingly facilitates the work of the former.

73. However, such machinery may be either ineffective or non-existent. It may be ineffective if, for lack of sufficient political will (or for lack of means to carry out such a policy), the courts fail adequately to respond to the need for justice; it may be non-existent if, as a result of the weakening or breakdown of the State, the courts are unable to function. This then raises, subsidiarily, the possibility of handing matters over to an international jurisdiction. It is extremely important that this alternative measure should be based on this "principle of subsidiarity" to ensure that such an initiative, especially in the case of an ad hoc tribunal, is not perceived as a form of interference in domestic affairs or a violation of national sovereignty.

(b) Towards an international tribunal?

74. In the wake of the Nürnberg trials, the idea of an international criminal tribunal was taken up in the 1948 Genocide Convention and then in the 1973 Apartheid Convention. Although both instruments explicitly provide for international tribunals, the latter have never come into being.

75. Here again, there is a whole range of possibilities between what is ideally desirable and what is relatively feasible:

(a) The ideal would be a permanent international criminal tribunal instituted by a multilateral convention. This would entail several years of arduous negotiations on an instrument which might eventually be ratified only by those States which feel there is little likelihood of their ever coming before such a tribunal.

(b) If we turn to what is relatively feasible, within a reasonable period of time, we come back to the possibility of establishing "ad hoc" tribunals, such as the tribunal which the Security Council decided to set up on 25 May 1993, in resolution 827 (1993), to try the serious crimes committed in the former Yugoslavia. The ad hoc nature of such tribunals should not jeopardize the future of a permanent tribunal, nor should it serve as a pretext for postponing its establishment indefinitely. This initiative should, on the contrary, constitute a basis for the future draft treaty. Hence the need to adhere closely to the legal safeguards deriving from the rule of law.

76. As far as procedural rules are concerned, 25/ therefore, there is a need for a credible response to possible criticism that the tribunal would be of an ad hoc nature (or even a tribunal of special jurisdiction) by adopting, by reference to the practice of the United Nations Human Rights Committee, the procedural guarantees contained in articles 14 and 15 of the International Covenant on Civil and Political Rights (presumption of innocence, principle of the legality of offences and sentences). This reference is all the more

important in this instance because the Committee's practice refers precisely to article 14 in order to determine the cases in which the special nature of a jurisdiction is admissible or not. The non bis in idem principle could not be applied since, again in keeping with the Committee's practice, it concerns the trial stage and not the prosecution, and is only effective domestically and not at the multilateral international level.

77. In order to avert criticism concerning the special nature of the jurisdiction it will be necessary to go beyond the concepts that prevailed in the Nürnberg Tribunal, some of whose rules, however admissible at a time when international human rights law was insufficiently developed, should not be given fresh currency (the absence of a two-level jurisdiction, relative retroactivity, etc.).

78. To avert this criticism concerning retroactivity in respect of the offences on which the prosecution and possible convictions are based, the grounds for charges should as far as possible be those provided for in the Geneva Conventions because, as we have noted, these instruments have been ratified by virtually all Member States. However, there is one reservation: rape is not expressly covered by the Geneva Conventions.

79. Their implementation in conjunction with the Convention relating to the Status of Refugees of 28 July 1951 would provide a far from negligible means of effectively combating impunity, as the latter Convention stipulates that the political nature of the offences may not be invoked by the person who has left his country. Article 1(F) excludes the possibility of obtaining political refugee status:

> "F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

80. With the exception of a tribunal set up after a victory and charged with trying the losers, it is uncertain whether the accused will appear - at least in the short term. For this reason, the possibility of employing the "contumacious judgement" procedure should not be dismissed, preceded by a solemn summons to attend spontaneously and followed, should a conviction be handed down, by the issuing of an international warrant through ICPO - Interpol. This procedure would, moreover, be compatible with the statutes of Interpol because, as we have seen, the political nature of the crime could not be held up as an objection. This mandate would "sentence" the person concerned to a form of house arrest in his country (principle of non-extradition of nationals) or to live as an outlaw (in hiding, under a false identity, plastic surgery, etc.) elsewhere in the world, a serious handicap for a figure - such as a statesman - having pretensions to international stature.

81. We should certainly not underestimate the reticence of countries whose legal system is based on the English legal system and makes no provision for trial in absentia. A compromise has to be sought because - need it be repeated? - except in the case of a tribunal trying the losers (although even then many of them may have fled, which means that the value of the contumacious procedure remains), the perpetrators of serious violations will not turn up at their trial of their own accord. In the eyes of public opinion, there is a risk of this situation seriously undermining the credibility of a tribunal which has been widely publicized and established at great expense - and which in the end fails to deliver justice.

82. A compromise has been suggested at the initiative of Mr. Alain Pellet, member of the International Law Commission: it entails including in the rules of procedure of the tribunal a provision under which, beyond a certain deadline, and after failure to respond to the invitation to attend had been duly established, the indictment would be made public at a hearing and, if appropriate, the charge solemnly read out; in this case, an international warrant of arrest would then be issued under the conditions mentioned above.

83. Lastly, the attention of the State parties to the Geneva Conventions should be drawn, firstly, to article 1, common to the four Conventions, in which they undertake not only to respect, but also to "ensure respect" for the Conventions in all circumstances, and secondly, to the clause relating to universal jurisdiction, common to the four Conventions (I, art. 49; II, art. 50; III, art. 129; IV, art. 146).

84. In his commentary on the Geneva Conventions, Jean Pictet, referring to the above articles, stresses that the scope of universal jurisdiction in no way excludes bringing the accused before an international tribunal whose competence has been recognized by the contracting parties.

2. The requirements of collective memory

85. One of the fundamental aims of the authors of the Charter of the Nürnberg International Military Tribunal in devising the concept of a crime against humanity was to preserve the right to memory by legal means. An essential characteristic of this concept is the non-applicability of statutory limitations, or imprescriptibility. Its purpose is to remove any possibility of the crimes in question falling into oblivion, which for its part is given legal standing by the mechanisms of prescription. This landmark in international law meets the four aspirations explained in the following paragraphs.

(a) Everything must be done to ensure that justice can take its course taking into account the extreme gravity of the violations

86. The acts in question are so barbarous that imprescriptibility is required in order to prevent any deviation from the course of justice. The punishments provided for under ordinary law are insufficient: "justice", it is said, "must take its course", "justice must be done". This exceptional situation - which is in itself serious because it runs counter to prescription, one of the

oldest legal principles - must therefore be reserved, in the words of the fourth preambular paragraph of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, solely for "the gravest crimes in international law". 26/ Various terms are used to characterize this extreme gravity; the violations should take the form of a "large-scale practice" displaying a number of characteristics which categorize it as a "series" or a "system" or, according to the more rigorous wording of the French Court of Cassation, a "policy of ideological hegemony".

87. However, characterization as a crime against humanity has other effects also related to the barbaric nature of the acts. It would have been possible to devise a system which considers imprescriptibility as a sort of aggravating circumstance attached to the extreme gravity of the acts punished according to ordinary law. By adopting the principle of specific characterization, the States parties to the London Agreement of 8 August 1945 wished not only to establish that statutory limitations were not applicable to a crime against humanity, but also to establish its infamous character. If the aim had been only to establish the non-applicability of statutory limitations as such, it would not have been necessary specifically to characterize a crime against humanity. It would have been sufficient to make a list of ordinary crimes considered to be imprescriptible since they had been committed in the name of a policy of ideological hegemony, to use the expression quoted above. The authors of the London Agreement wished to take into account not only persons who had suffered injury during their lifetime or who had lost their life, but above all the disgrace done to all mankind through the "negation of the humanity of members of a group of men in pursuance of a doctrine". 27/

88. Mainly because of the quite understandable pressure by the victims or their relatives, there is a great temptation to characterize many violations as crimes against humanity, on account of their intensity or the gravity of their consequences for society. But the strict interpretation must prevail in order to avoid indiscriminate use of this concept. Thus the idea of characterizing drug-trafficking as a crime against humanity was put forward in order to stop the perpetrators from adroitly taking refuge in statutory limitation. The indiscriminate use of the concept can be avoided while at the same time moving towards the desired goal: it is sufficient to declare that statutory limitations specifically do not apply to these violations, without necessarily characterizing them as crimes against humanity, or more simply as continuing crimes, so that the commencement of the period of limitation is postponed until the day when justice is ready to "take its course", which is the end in view.

89. The trial in itself, irrespective of its punitive role, is one of the elements of collective memory. It enables the facts, evidence and testimony to be submitted publicly to the rigour of adversarial proceedings, and the records of the proceedings later to be placed in the archives, which are in fact the real memory. From this standpoint, it may be said that at Nürnberg the important point was not so much the handing down of a conviction as the actual fact that the trial took place, with its capacity for placing facts on record.

(b) Preventing the recurrence of crimes against humanity

90. Combating oblivion through imprescriptibility also means hanging a sword of Damocles over every perpetrator of a crime against humanity. The fact that a torturer knows for certain that he may one day be called to account is the most effective means of preventing torture through deterrence. At the very least, this prevents him from coming back to mock the victim by hogging the limelight after the fall of the regime of which he was an accomplice.

(c) Combating revisionism

91. The past decade has seen the rise of revisionist arguments that try to challenge historical facts or the way in which they occurred in order to deny them or, more subtly, to tone them down (e.g. the massacre theory taking over from the genocide theory). One of the purposes of this "toning down" is to rid them of their character of extreme gravity, in order to exclude them from the category of crimes against humanity. Being then subject to ordinary prescription, with time a trial can be avoided.

92. In addition to the court records, therefore, all public records must be preserved in order to halt effectively this rise in revisionist arguments, which often make their appearance only after a very long latency period. We shall deal in particular with two categories of records: (a) those of the places of detention, and (b) the files of the security, intelligence and political police departments.

(i) The records of the places of detention

93. The records in question are those of all the places of deprivation of liberty, whether they be prisons, including unofficial prisons, or psychiatric hospitals. They enable the victims to assert their rights, in particular because they contain evidence that is irreplaceable for the purpose of determining responsibility (identification of administrative and supervisory personnel). Need one recall that in France it was the deportees who had been assembled in the Drancy camp for transfer to the concentration camps who, after their release, opposed the destruction of the records by their own guards? But above all, the records serve to identify more closely either the clandestine places of detention or, inside official prisons, the cases of secret detention. The management of any group of human beings, even in such circumstances, presupposes a minimum of record-keeping by those in charge: for example, the fact that there is a significant discrepancy between the large quantity of food rations and the small number of persons allegedly held can be an important indicator of clandestine detention.

(ii) The files of the intelligence and political police departments

94. If there is a change of political regime, the fate of these files becomes a problem immediately following the downfall of the former regime. The principle of preserving them should prevail over that of destroying them, strict rules for their use being laid down if necessary. Paradoxically, both the perpetrators and the former victims may have the same reaction of wanting to destroy them. On the one hand, the perpetrators want to destroy all traces of their involvement (for instance, the persons who collaborated with the

STASI in the former German Democratic Republic), and on the other, the former victims want them destroyed because they fear that these files - which they consider demeaning - may continue to be used (for instance, the files compiled against the Jews by the Vichy Government in France between 1940 and 1944). A third and particularly distressing possibility has unfortunately also to be taken into account: that of the victim who, because he cooperated under torture, makes every effort to remove any trace of his cooperation in order to keep his innermost secret from his relatives, and especially from those - often his friends - who were indirectly his victims.

95. For all these reasons, the decision as to whether or not to open these records to the public is particularly serious because the sensitivity of their contents complicates any process of restoring tolerance with a view to possible national conciliation or reconciliation. From this point of view, the position adopted in Paraguay after the discovery, in February 1993, of several tons of records of the security guard of the dictator Alfredo Stroessner is to be welcomed. They contain, among other things, the records of Operation Condor launched from General Pinochet's Chile and confirm the information (that had always been denied before) that there was a coordination network of security services linking Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay. 28/

96. Consequently, it is important that the records should be strictly regulated in order to ensure their preservation, to organize access to them and to guarantee the rights of the persons they implicate.

Ensuring the preservation of records

97. This is not so much a question of establishing technical guarantees as combating a recent phenomenon, the international trafficking in records by the persons formerly responsible for them. In Russia, for example, the theft of documents for commercial purposes seems to have assumed such proportions that the President of the parliamentary commission on the transfer of records to Russia, and his deputy, have written to the Head of State informing him of their concern at the sale of documents taken from archives, in particular those of the KGB, to foreign publishers. 29/

Organizing access to archives

98. This question is relevant to two situations: access by researchers and historians, and the individual right of access by any implicated person to information concerning him. On the first point, it is essential that a legal basis should be established, because most authoritarian regimes do not allow even a minimum degree of transparency, all documents being classified "secret". On the second point, there should be no impediment to exercise of the individual right of access. Anyone who has been implicated should be entitled:

(a) "To a fair and public hearing by a competent, independent and impartial tribunal established by law" (International Covenant on Civil and Political Rights, art. 14, para. 1), at least as a remedy;

(b) To avail himself, in certain cases (family life, liaison) unconnected with the reprehensible acts, of his right to the protection of his privacy, within the meaning of article 17 of the Covenant, which states:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

99. Considering the complexity of the task and in order to avoid overburdening the courts, it appears reasonable to allow, initially, applications for access to records and objections to information they contain to be submitted to an ad hoc commission for appraisal, provided that such a commission offers sufficient guarantees of impartiality and subject to possible submission of an appeal to a court established in accordance with article 14, paragraph 1, of the Covenant. These guarantees are particularly important since they relate to records that were constituted without any legal control, with information furnished by suspect sources. They may contain errors, including errors involving persons who have the same name, and are often used for purposes of blackmail or manipulation. One instance of such use is that of maintaining that a leader of a dissident or opposition group is a "police informer", an intelligence agent or an infiltrator or that a person talked under torture, when in fact he resisted torture and died as a result. In fact, the object is not only to take a person's life or mutilate his body, but also to destroy his honour and thus make it easier to discredit him and destabilize the movement.

100. For these reasons, if the records are preserved and not destroyed, the right of access must be supplemented by a right of rectification in the case of a partial error, and the right to demand deletion in the case of a serious error (e.g. non-existence of the fact alleged, or error concerning identity). One interesting precedent is the new Constitution of Paraguay, which recognizes citizens' right of access to information concerning them contained in the records compiled under Alfredo Stroessner's dictatorship.

(d) Restoring the historical and cultural dimensions of the right to memory

101. With the passage of time, no records of any kind are used to prosecute the perpetrators of violations, to carry out purges of the administration or to assert the rights of victims. The possibility of destroying the files arises again, since their preservation may be interpreted as a kind of "legalization" of infamy. This was what occurred, in France, with some of the records referred to above concerning the Jewish community on the ground that they were based on manifestly unconstitutional regulations. They were destroyed in the 1950s on the instructions of the Government after they had been utilized by the competent courts of law to carry out purges or to prosecute the perpetrators of violations and their accomplices. This explains the legitimate protests made subsequently by researchers and historians. Similarly, the Inter-American Commission on Human Rights has expressed the view that every society has the inalienable right to know the truth about past

events and the reason why, and the circumstances in which, abnormal crimes could be committed, in order to prevent a recurrence of such events. 30/ This historical and cultural dimension was highlighted in the final resolution adopted by the International Meeting concerning Impunity. The participants recalled: that there is an obligation to tell the truth in all circumstances; and that the future of a people cannot be founded on ignorance or the denial of its history just as a people's knowledge of the history of its suffering belongs to its cultural heritage and as such must be preserved. 31/

3. The legal and political constraints of the processes entailed by reconciliation

102. Between the uncompromising demand for justice and inevitable aspirations for a political solution giving rise to a process of national reconciliation, there is, once again, a wide range of options, given the diversity of situations. The solutions reached in the following situations, for example, are evidence of this constant adaptation to the variable geometry of circumstances.

(a) In Spain, the spectre of the civil war of the 1930s, the longing for change, and the skilful and gradual marginalization of the former regime undoubtedly explain why, for the pro-Franco perpetrators of serious violations, the page was turned without any debate, without any formal legal procedures, even after an amnesty. This course was in keeping with the aspiration of the people, basically concerned about the rehabilitation of the republicans who, after the civil war, remained marked by penalties additional to those imposed at the time for sedition. The only amnesty enacted was in their favour;

(b) In France, it took over 20 years and several amnesty laws for the dark pages of the Algerian war to change from violence to politics and from politics to history, history which remains to be written.

103. The question is being asked more and more often in the context not only of a process of democratization, but also of peace. The question of amnesty is then the central issue of the peace agreements. This was demonstrated once again by the agreements which brought the conflict in New Caledonia to an end and which were almost broken during the negotiations, for lack of an agreement on the question of amnesty; or again by the peace agreements now being implemented in El Salvador, agreements which were signed in Mexico City under United Nations auspices on 16 January 1992.

104. The study of past or current experiences shows how difficult it is to arrive at an ideal solution. In the light of these experiences, however, two observations must be made: first, no higher interest, not even national reconciliation, can legitimize "absolute impunity"; and secondly the conditions for a firm and general policy ensuring that all perpetrators of violations are punished have never been met throughout history. Should one therefore conclude - at least to satisfy the needs of this paper - that some degree of "relative impunity" may be accepted in certain circumstances? If this is the case, what is the hard core from which there can be no derogation,

short of undermining the campaign against impunity? In exceptional circumstances, can some measure of flexibility be allowed? Two vitally important questions arise in practice: the question of amnesty and the question of purges.

(a) Problems associated with amnesty

105. The problems relate to the admissibility or inadmissibility of amnesty in the light of imprescriptibility (first hypothesis), and in the light of the right of everyone to a hearing (second hypothesis).

(i) First hypothesis

106. Imprescriptibility and amnesty are incompatible to the extent that the latter completely invalidates the very essence of imprescriptibility, which is to enable "justice to take its course". At most, it may be admitted that, since the purpose of imprescriptibility is to avert the abatement of public prosecution, in order to prevent impunity from being granted, once prosecution has taken place, and the sentence has become final and been fully enforced, amnesty would then become compatible with imprescriptibility because justice would have taken its course.

107. Some people argue that to admit amnesty in this case would be tantamount to granting a kind of rehabilitation, which is inadmissible, because linked imprescriptibility is indissolubly linked to the concept of a crime against humanity; now as we have seen, this categorization means that the punishment entails loss of civil rights, which excludes any rehabilitation, even posthumously. According to this interpretation, imprescriptibility lasts for all eternity.

108. Others reject this interpretation and assert that prescription and amnesty have different bases. The first is linked to oblivion and the second to pardon. Prescription has automatic effects as soon as time has run its course; it presupposes that justice has remained inactive during a predetermined period, after which the evidence is liable to be distorted or to have disappeared. Amnesty is the express manifestation of the will of the legislator (or of the people in the case of a referendum) to absolve certain categories of acts of any criminal character with the aim of strengthening social cohesion. In other words, prescription creates an obstacle to possible prosecution, while amnesty strips the violation for which it is granted of the legal element that makes it criminal. Lastly, the principle of imprescriptibility enacted for crimes against humanity constitutes a derogation from a general principle of law, and as such should be interpreted all the more restrictively. The advocates of this position conclude that one cannot therefore, by analogical reasoning, deduce from the exception constituted by imprescriptibility a principle equivalent to exclusions from amnesty. That was the solution adopted by the Paris Court of Appeal in a Toumi judgement of 12 March 1986: "Amnesty, which is a sovereign act of the legislature, extends to all violations without distinction or reservation, according to their nature, their legal characterization or their degree of gravity (...) and especially to violations denounced as crimes against humanity".

(ii) The second hypothesis

109. The solution advocated by the Inter-American Commission on Human Rights (IACHR), which, as we have seen (para. 25), is opposed to amnesty, is based on completely different arguments. It holds that there is incompatibility, not so much on account of the imprescriptibility of the crime or otherwise, and hence of its greater or lesser gravity, as because the effects of amnesty violate a right which the Commission considers to be fundamental, namely, the right of every person - in this instance the victim - "to a hearing with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal" (American Convention on Human Rights, art. 8, para. 1) 32/ In other words, until justice has taken its course, amnesty is incompatible with the campaign against impunity, regardless of the gravity of the acts. Is it possible afterwards? The Commission does not give an express opinion on this point, but this possibility is the logical consequence of its argument.

110. IACHR's reasoning takes it as an established fact that the right of every person to a hearing by a tribunal, as provided for in article 8, paragraph 1, of the American Convention on Human Rights, belongs to the category of rights from which there can be no derogation according to international human rights law, 33/ in other words, to the category of rights that may not be suspended, restricted or limited in any way, either during a period of crisis (state of emergency) or in ordinary times.

The situation under a state of emergency

111. The rule, which is set out in the International Covenant on Civil and Political Rights, is that the rights protected by the Covenant may be suspended or limited on condition that the state of emergency is established with due observance of certain procedural and substantive guarantees (it must be proclaimed in accordance with a specific procedure, it must be limited in time and the measures taken must be in proportion to the gravity of the danger). However, there are certain essential rights excepted from this rule and expressly referred to and limitatively enumerated (International Covenant on Civil and Political Rights, art. 4; European Convention, art. 15; American Convention, art. 27) which may be neither suspended nor even limited. There can be no derogation from them.

112. What are these rights? A first list is common to the three instruments referred to above and includes the right to life, the prohibition of torture and slavery, and the principle of non-retroactivity in criminal matters. To this "hard core", two of these instruments add 34/: (a) the right to recognition as a person before the law (Covenant, art. 16; American Convention, art. 18); and (b) freedom of conscience and religion (Covenant, art. 18; American Convention, art. 12). The American Convention also extends its absolute protection to the following rights: rights of the family (art. 17), right to a name (art. 18), rights of the child (art. 19), right to nationality (art. 20), right to participate in government (art. 23).

FIRST CONCLUSION

113. Under a state of emergency, none of the provisions of the instruments cited above confers absolute non-derogability on the right guaranteed by article 8, paragraph 1, of the American Convention on Human Rights, on which the Inter-American Commission on Human Rights bases itself.

The situation in normal times (when no state of emergency exists)

114. Here the mechanism is reversed: none of the rights guaranteed, for example by the Covenant, can be suspended. Nor can they be subjected to any restrictions other than in a few cases and on an altogether exceptional basis. In any event, the restrictions must meet the following conditions:

(a) They must be expressly authorized by the article guaranteeing the right concerned (for example, Covenant, art. 12: freedom of movement; art. 18: freedom of conscience and religion; art. 19: freedom of expression; art. 21: freedom of assembly; art. 22: freedom of association). 35/

(b) They must meet the test of "democratic admissibility", which poses the following conditions of form and substance: (i) the restrictions must be provided for by law; and (ii) they must be "necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others".

SECOND CONCLUSION

115. As regards the thesis of the Inter-American Commission on Human Rights (IACHR), article 8, paragraph 1, of the American Convention on Human Rights, which guarantees the right of every person to a hearing, does not provide for such a derogation in the form of a "democratic admissibility clause" authorizing restrictions (such as amnesty). Nor do the corresponding articles of the International Covenant on Civil and Political Rights (art. 14), the European Convention on Human Rights (art. 6) or the African Charter on Human and Peoples' Rights (art. 7).

116. The IACHR can therefore be deemed justified in considering that any measure tending to deprive the victim of his right to a hearing - in the particular case, an amnesty measure - constituted a violation of article 8, paragraph 1, of the American Convention, whether adopted in normal times or during a period of emergency.

117. The opposite argument is that this part of the article deals with criminal matters and therefore concerns only the personal protection of the accused. This would explain why the provision refers to a hearing by a tribunal "in the substantiation of any accusation of a criminal nature made against him" or "for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature". According to this interpretation amnesty can be granted, while respecting article 8, paragraph 1, if the victim has the possibility of seeking to establish the responsibility of the State before the competent civil or administrative court and/or of obtaining, by

judicial means, material and moral reparation for the injury suffered. One unresolved point here is whether compensation granted by decision of an administrative commission could be admissible.

THIRD CONCLUSION

118. In the final report, the scope of the right of every person to a hearing should be better defined, with greater clarification of the absolute or relative character of the non-derogability of this right.

(b) Problems associated with purges

119. In considering developments relating to the "need for justice", we have seen the context in which this question arose in relation to the judiciary. But beyond the judiciary, the entire administration, and most especially the armed forces and the police, are concerned to varying degrees.

120. To deal with purges in a study on human rights may appear paradoxical. This is a particularly sensitive and complex matter, but the authors preferred not to evade it, since it is always an acute problem in periods of major change. Where the aim is to manage an existing situation, in other words to adopt a conservative approach, the issue does not arise. Where, on the other hand, the aim is to create change, the administration, either through ideological reflex or simply through routine, tends to severely curb the process or sometimes, in the case of the armed forces, to actively resist it. Where change responds to a deep-seated popular aspiration manifested through a legal ballot (election, referendum, etc.), it becomes necessary for the means of action available to the new authorities, in other words the State, to be capable of producing change. In order to address this issue, it is proposed that the final report should draw more particularly on European experiences 36/ following the end of the Second World War and, for the contemporary era, the recent experiences of East European countries, especially Czechoslovakia, in respect of the civil administration, and the experiences of El Salvador in respect of the armed forces.

(i) Purges of the civil administration

121. The Czechoslovak experience is interesting in that it enables the following matters of principle to be analysed from a practical standpoint:

(a) Should purges be conducted on the basis of existing legislation, with the interpretation of the law (jurisprudence) being adjusted as necessary, or by promulgating new legislation, possibly of an emergency nature?

(b) Should purges be solely punitive or also aimed at eliminating obstacles to the implementation of a new policy, which implies placing the emphasis on administrative measures such as reassignment, dismissal, early retirement and the proclamation of certain incompatibilities rather than on penal measures?

(c) What are the nature and scope of the safeguards that should accompany the purging process, particularly in relation to the principle that every person has the right to a hearing?

(ii) Purges of the armed forces and the police

122. The Salvadorian experience is based on the Mexico City Peace Agreement, and more particularly on chapters I and II, which redefine the mission of the armed forces and provide for their purging, as well as for the establishment of a national civil police. The safeguards surrounding these purging measures constitute a precedent warranting in-depth analysis, firstly because they were negotiated under the Peace Agreement (whereas it is usually a matter of the victor imposing his will on the vanquished), and secondly because they were formulated and implemented under the auspices of the Secretary-General of the United Nations. Their main features are summarized below.

123. Decisions are taken by an ad hoc Commission composed of three leading figures of recognized impartiality and democratic sentiments, designated after consultations conducted by the Secretary-General of the United Nations. Two officers with impeccable professional records, designated by the President of the Republic, join the Commission during the deliberative phase. The Commission on the Truth (see paras. 70 and 71) may designate an observer.

124. The Commission's evaluation must take into account, in respect of each officer:

His record of observance of the legal order and human rights, both in his personal conduct and in his rigour in preventing or punishing violations;

His professional competence;

His capacity to promote the new peace dynamic, guarantee respect for human rights, promote the democratization of the country and reunify Salvadorian society.

The Commission takes decisions after hearing the persons concerned, and makes recommendations, which have related to the dismissal or transfer of 102 officers. For the implementation of these decisions, see the report of the Secretary-General of 21 May 1993 (S/25812, para. 4).

(iii) Purges of paramilitary forces

125. As the Salvadorian experience shows, such purges differ from the previous case in that they are more concerned with the elimination or eradication of shadowy units such as death squads, paramilitary or mercenary groups and private militias, which are characterized by their secret links with State structures and the private sector (large landowners, entrepreneurs). Stamping out this "infamous phenomenon" is doubly necessary, according to the Salvadorian Commission on the Truth:

(a) Their extensive network 37/ and their clandestine connections with the intelligence services and private-sector landowners or enterprises make it

make it difficult to dismantle them. Given the consequent risk of their reactivation, it is important to take firm and far-reaching action;

(b) Because of their structure, organization and fire-power, there is a serious danger that the death squads will, as has already happened, turn to criminal activities such as drug-trafficking, arms trafficking and kidnapping to extort money.

126. At the very least, the following measures should be taken:

(a) The organizational structure of the perpetrators should be pieced together and their civil status and possible function in the army or the police determined, in order to identify them;

(b) The network of secret relations between these perpetrators and their active or passive partners in the security forces should be reconstructed;

(c) Their links with landowners or entrepreneurs providing financial or logistical support should be charted;

(d) An in-depth study should be made of the functioning of the intelligence services with a view to reordering their activities;

(e) International cooperation should be assured, particularly with third countries that have been actively involved (for example, at the time of German reunification, discovery of the support provided by the former German Democratic Republic to terrorist commando groups or, again, according to the Commission on the Truth, the toleration by the United States of the machinations of Salvadorian exiles who financed and masterminded the death squads between 1979 and 1983).

CONCLUSIONS AND RECOMMENDATIONS

127. National reconciliation is only possible beyond the stage of forgiving and forgetting. That is why, in the short- or medium-term, we prefer to use the expression "conciliation", which is more respectful of the distress of the victims. There again, the final report should define the possible "hard core" that should be respected in any process of national conciliation. Discussions might focus on the following six guidelines:

I. Action should be guided by the sole objective of civil peace, with a view to guaranteeing the security of the most disadvantaged persons as a matter of priority, since social injustice is more often than not at the origin of the troubles that engender impunity (see the earlier reference to the concept of serious violations of economic and social rights).

II. A decision should be taken to discontinue proceedings against prisoners of opinion and to release them immediately (not to grant them an amnesty, since this would signify acknowledgment of the criminal nature of their actions, when in fact all they have done is to exercise a legitimate right, and the true offender is the perpetrator of the arbitrary detention).

III. Impunity should not be encouraged, which means that the instigators and highly placed persons responsible should be brought to justice and tried.

IV. A commission for the establishment of the truth should be set up in order to preserve the "right to know" of victims and to incorporate the historical dimension of conciliation, which means acquiring awareness and not forgetting.

V. Perpetrators other than those covered by principle III should be tried, or at least purged.

VI. The following measures should be taken in support of victims:

(a) Compensation for injury suffered;

(b) Reinstatement in their employment of persons dismissed for political reasons;

(c) Right of return for exiles and measures for their reintegration.

128. Only after this lengthy sequence can national reconciliation be envisaged, and then only if the perpetrators of violations, especially those who have not been tried, agree to openly repent, failing which the victims cannot be asked to participate in a process of forgiveness. Without a minimum of repentance, any clemency measure may be interpreted as an endorsement. It may be noted that a display of repentance by all the parties concerned facilitates such a process. (The importance of this point is demonstrated, in the case of El Salvador, by the public act of self-criticism made by the FMLN in order to facilitate conciliation within the framework of the National Commission for the Consolidation of Peace (COPAZ). 38/ This is particularly true since, under the Peace Agreements, FMLM members responsible for serious violations will not be able to accede to public office. This agreed purging measure deserves to be acknowledged in an equally responsible manner by the State party in order to facilitate the purging of the armed forces.

129. Without being exhaustive, this report has tried to identify the many facets of organized impunity more clearly, with the aim of facilitating the formulation of a strategy geared to the historical period through which the country is passing; such a strategy must give priority, in turn, to prevention through training and advisory services and to law enforcement as a means not only of inflicting punishment, but also of perpetuating the memory of history as it actually was and not as revisionism always wants to rewrite it.

130. The campaign against impunity must employ a variety of means and be organized on a long-term basis, setting itself the following four additional goals:

(a) Trying the perpetrators of serious violations;

(b) Ensuring the victims' right to know and to obtain reparation;

(c) Guarding against forgetting and revisionism, particularly through the keeping of records;

(d) At a given point in time, taking account of aspirations for national reconciliation while respecting certain limits beyond which national reconciliation would be the accomplice of impunity.

131. To conclude this progress report on impunity, the authors make the following recommendations:

1. The final report should take greater account of the suggestions made by Mr. Theo van Boven in his study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. 39/

2. The present study may be expected to be followed by a specific report on action to combat impunity for serious violations of economic and social rights.

3. Non-governmental organizations should be given a greater role in the strategy for combating impunity.

4. The scope of due obedience in the light of the theory of mitigating circumstances should be more clearly delimited in order to restrict its effects.

5. A comparative study should be made of the various experiences of the truth-finding commissions in order to assess the feasibility and desirability of establishing some guidelines on the subject.

6. Efforts should be made to find ways and means of overcoming the obstacles posed by the in absentia procedure before a possible international court.

7. Guidelines for conserving and regulating access to the files and records of the security and intelligence services should be drawn up.

8. A specific study should be prepared, in conjunction with the Human Rights Committee and the regional commissions and courts, on the scope of the right of every person to a hearing, and particularly on whether or not this right is subject to derogation.

9. A comparative analysis should be made of the various purging policies implemented in recent decades in order to identify possible guidelines regarding grounds that may legitimize such policies and the safeguards to be afforded.

10. Ways and means of eradicating the practice of death squads should be studied.

11. Guidelines for the implementation of national reconciliation policies, including in particular a hard core of principles which may not be violated in any circumstances, should be worked out.

12. A programme of action ensuring the optimum application of the provisions of the Geneva Conventions and Protocols which can be used to combat impunity should be formulated.

The primary beneficiaries of these treaty norms are the victims, followed by States as the entities responsible for their implementation, without of course forgetting the specific assistance that can be provided by the International Committee of the Red Cross (ICRC) pursuant to the provisions common to the four Conventions. Making these norms more effective involves taking certain initiatives, namely:

(a) The launching of an awareness campaign aimed at inducing States parties to incorporate in their criminal legislation the enforcement provisions laid down in the Conventions.

(b) The conduct of a study designed to elucidate the following two points in order to identify more clearly the reasons for this ineffectiveness:

(i) Conclusions to be drawn from the few cases in which the perpetrators of serious crimes have actually been sentenced on the basis of the Geneva Conventions (for example, the United States, where war crimes are also offences under the United States Uniform Code of Military Justice, which the Criminal Investigation Division is responsible for prosecuting. Between 1965 and 1973, 36 cases in which indictments were preferred against army personnel for war crimes were brought before the court martial; 20 of them resulted in convictions);

(ii) Conclusions to be drawn concerning the use, or otherwise, of the universal jurisdiction clause contained in the Conventions;

(c) The development of coordinated action by non-governmental organizations vis-à-vis States parties to ensure that, on a case-by-case basis, States parties give full effect to the aforementioned article 1 common to the four Conventions, by which they undertake not only to respect those instruments but also to ensure respect for them, even if they are not parties to the conflict;

(d) The expansion of the role of victims and the relevant non-governmental organizations in ensuring the application of the Conventions, particularly through a revised interpretation of the concept of a legitimate interest in action which takes better account of the spirit, and indeed the letter, of the Geneva Conventions, so as to enable certain NGOs to bring proceedings before the competent national or, as appropriate, international courts. 40/ In that connection, it would be desirable to explore the possibilities of a joint interpretation by National Red Cross Societies, on behalf of the victims, of the statutes of the International Federation of Red Cross and Red Crescent Societies, on the one hand, and of the Conventions, on the other (for example, Convention IV, art. 142, and, in particular, Protocol I, art. 81, para. 3);

(e) Promotion of the use of the means afforded by the International Fact-Finding Commission, a body of inquiry provided for by article 90 of Protocol I.

POSTSCRIPT

132. We would like to conclude this progress report on a hopeful note. It is possible to combat impunity and render justice without jeopardizing the possibilities for national reconciliation, as demonstrated by the recent decision of the Supreme Court of Bolivia (21 April 1993), which served to restore confidence in the judiciary, one of the cornerstones of any democracy. After a seven-year campaign against impunity, human rights associations and democratic organizations hailed this ruling as the "judgement of the century". Judge Gualberto Davalos, sharing this view, observed that this decision "constitutes an important precedent for the strengthening of democracy and a warning in Bolivia as in other countries of Latin America" to anyone contemplating a coup d'état. 41/

133. The perpetrators of the most serious violations, who had ousted the constitutional Government of Lydia Gueiler, together with 44 of their accomplices, received the following sentences:

The former dictator Luis García Neza: 30 years' imprisonment without the possibility of a pardon;

The former Minister of the Interior, Luis Arce Gomez, the former chief of the repressive apparatus, Guido Benavidez, the former chief of the National Department of Investigation, Freddy Quiroga, the former chief of the Special Security Service and his deputy Tito Montano: 30 years' imprisonment.

134. It is fitting that a report on the adverse effects of impunity should conclude with a tribute to those responsible for such a decision, which, far beyond the country's frontiers, does honour to justice in Bolivia, gives renewed hope to all victims and their relatives, and shows that justice can prevail over impunity.

Notes

1/ The International Meeting Concerning Impunity for Perpetrators of Gross Human Rights Violations was organized under the auspices of the United Nations Centre for Human Rights, jointly by the International Commission of Jurists (ICJ) and the Commission nationale consultative des droits de l'homme (CNCDH-France) from 2 to 5 November 1992 at the Palais des Nations in Geneva. The proceedings of this Meeting have been published by the ICJ under the title Justice not impunity (Geneva, 1993).

2/ By a letter of 16 March 1993 addressed to the Centre for Human Rights for the attention of the Commission on Human Rights, Colombian members of parliament who are members of the "Esperanza, Paz y Libertad" association, which is composed of former guerrilla fighters who have joined the democratic struggle (Alianza Democratica), stated that 165 members of the People's

Liberation Army had been summarily executed by their former comrades who opposed the peace agreements, with a view to halting through terror the abandonment of the armed struggle in Colombia.

3/ In El Salvador, according to the Commission on the Truth, responsibility, almost always cited in denunciations, is in 85 per cent of cases attributed to State officials, paramilitary groups connected with the State or death squads, and in only 5 per cent of cases to the Farabundo Martí National Liberation Front (FMLN) (quoted by the news agency Diffusion de l'information sur l'Amerique latine (DIAL), press release No. 1678, Paris, 16 April 1992).

4/ Louis Joinet, "Les tribunaux d'opinion", in Marxisme, démocratie et droit des peoples - Hommage à Lelio Basso, p. 821, Editions Franco Angeli, Milan, 1979.

5/ Léo Matarasso, "Brève contribution à l'histoire du Tribunal Russell sur les crimes de guerre au Vietnam", in op. cit., p. 831.

6/ International League for the Rights and Liberation of Peoples, Impunity. Impunidad. Impunité, Geneva, February 1993, pp. 9 and 11.

7/ See also, in the report of the Working Group on Arbitrary Detention (E/CN.4/1993/24), deliberation 02, para. 20.

8/ Léo Matarasso quoted by Joinet in "Les tribunaux d'opinion" (see footnote 4 above).

9/ IACHR report No. 29/92 approved on 2 October 1992 (cases Nos. 10,029, 10,036, 10,145, 10,305, 10,372, 10,373, 10,374 and 10,375, Uruguay), OEA/Ser.L./V/II/82, doc. 25; see paras. 41 et seq. See also Robert K. Goldman, "Amnesty laws and international law: a specific case" in Justice not impunity, proceedings of the International Meeting concerning Impunity organized by ICJ in Geneva in November 1992 (see footnote 1 above); in this paper, R.K. Goldman deals with the IACHR's finding that Uruguay's 1986 amnesty law violated the American Convention on Human Rights.

10/ IACHR report No. 28/92, approved on 2 October 1992 (cases Nos. 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311, (Argentina), OEA/Ser.L/V/II/82; see paras. 43 et seq).

11/ In this connection, see article 13, paragraphs 3 and 5, of the Declaration on the Protection of All Persons from Enforced Disappearances, proclaimed by the General Assembly of the United Nations on 18 December 1992 in resolution 47/133.

12/ See the document submitted to the Sub-Commission's Sessional Working Group on Detention by John Carey, entitled "International standards for adequate investigations into suspicious deaths in detention, as well as adequate autopsy" (E/CN.4/Sub.2/1988/WG.1/WP.1) which cites in particular the

Minnesota Protocol, dated June 1987, and drafted by the Minnesota Lawyers' International Human Rights Committee concerning the prevention of extrajudicial, arbitrary and summary executions.

13/ "Annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency". This report is updated each year; the fourth and fifth reports bear the symbols E/CN.4/Sub.2/1991/28 and E/CN.4/Sub.2/1992/23/Rev.1.

14/ For further details on amnesty, see "Study on amnesty laws and their role in the safeguard and promotion of human rights" (E/CN.4/Sub.2/1985/16), report by Mr. Louis Joinet, Special Rapporteur.

15/ See Roland Bersier, "Extenuating circumstances according to the principle of superior orders" in Justice not impunity, proceedings of the International Meeting concerning Impunity, organized by the ICJ in Geneva in November 1992 (see footnote 1 above).

16/ General Assembly resolution 47/133 of 18 December 1992.

17/ Report of the International Law Commission on the work of its forty-third session, General Assembly (Official Records: forty-sixth session, Supplement No. 10 (A/46/10), chap. IV, sect. D.2, pp. 256 and 257).

18/ UNESCO, Symposium on "The role of Africa and its consequences in the encounter between two worlds", Commemoration of the fifth centenary, Praia, Cape Verde, 4-8 May 1992. See working paper, part III.

19/ Louis Joinet, "L'amnistie: le droit à la mémoire entre le pardon et l'oubli", in Communications, Paris, 1989, No. 49.

20/ Except in the case of what are known as "self executing" treaties, i.e. those whose fundamental provisions apply directly under domestic law.

21/ Etienne Bloch, "Purges", in Justice not impunity, proceedings of the International Meeting concerning Impunity organized by the ICJ in November 1992 (see endnote 1 above).

22/ This is the solution proposed in El Salvador within the framework of the implementation of the ONUSAL plan. In this connection, see the report of the Commission on the Truth (S/25500, annex, chap. V, sect. I.D.a).

23/ See Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985. See also the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

24/ A Chilean NGO has published a summary of this report under the title Para creer en Chile as part of a national educational campaign to promote the truth and human rights.

25/ Louis Joinet, "Alternatives for the establishment, on the basis of existing machinery, of an international criminal tribunal on the former Yugoslavia" (unpublished text).

26/ See also the working paper submitted by Mr. S. Chernichenko on drafting a declaration characterizing the gross and large-scale human rights violations as international crimes (E/CN.4/Sub.2/1992/51).

27/ Pierre Truche, "Le crime contre l'humanité", paper presented at the seminar on the philosophy of law organized in Paris on 2 December 1991 by the Institut des hautes études sur la justice.

28/ For a summary see press release No. 1767 of 5 April 1993 by the agency Dissemination de l'information sur l'Amérique latine (DIAL).

29/ Nadine Marie-Schwartzenberg, Le KGB, Paris, Presses universitaires de France, collection "Que sais-je?", 1993. In chapter VI, it is stated that KGB agents have tried to sell extremely valuable archive documents to Western publishers and that the Federal Security Agency - which took over from the KGB for a short time - struck a deal with an American firm which is planning to produce a television series based on the top secret dossiers of the former KGB. Russia's foreign intelligence service, for its part, is allegedly organizing commercial speculation through a front company, the Association of Former Intelligence Services Officers.

30/ Inter-American Commission of Human Rights, 1985-1986 annual report (OEA/SER.L/V/II.68, doc. 8, rev. 1, 26 September 1986).

31/ See footnote 1 above.

32/ See also the Universal Declaration of Human Rights, art. 10; the European Convention on Human Rights, art. 6, para. 1; and the African Charter on Human and Peoples' Rights, art. 7.

33/ See Nicole Questiaux, "Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency" (E/CN.4/Sub.2/1982/15, paras. 36 et seq.).

34/ The prohibition of imprisonment for debt is referred to only in the Covenant (art. 11).

35/ See also the European Convention, arts. 8, 9, 10 and 11; the American Convention, arts. 12, 13, 15, 16, 22 and 30, and the African Charter, arts. 11 and 12.

36/ Herbert R. Lottman, The Purge, New York, Morrow, 1986, pp. 332: See, in particular, chapter III.

37/ For example, the Organización Democrática Nacionalista (ORDEN), founded in 1963, had a nationwide network, with representatives in each commune, canton and community, and a total membership of at least 50,000. In this connection, see the report of the Commission on the Truth (S/25500, footnote 418).

38/ Cited by the news agency Diffusion de l'information sur l'Amérique latine (DIAL), press release No. 1678, Paris, 16 April 1992.

39/ For the second progress report submitted by Mr. van Boven on this topic, see document E/CN.4/Sub.2/1992/8.

40/ Oliver Russbach, "Le procès humanitaire" in Actes, No. 67-68, Paris, 28 September 1989, p. 92: "The best guarantee that offences under public international law and humanitarian law are tried is perhaps for citizens themselves to apply to the courts accessible to them, indicating the injury caused to them by such offences and claiming compensation therefor".

41/ Service, Peace and Justice in Latin America, Bulletin No. 26, April-May 1993, p. 3.